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No. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1904.

RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY, ET AL.,

PETITIONERS,

v.

WILLIAM H. STAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS,

RESPONDENT.

Reply Brief for Petitioners, on Motion for Writ of Certiorari.

S. HAMILTON GRAVES,
WM. G. ROBERTSON,
E. W. ROBERTSON,
ABRAM P. STAPLES,
Counsel for Petitioners.

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WM. H. STAAKE, TRUSTEE FOR C. R. BAIRD & COMPANY, BANKRUPTS, Respondent

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Brief of Petitioners in Reply to Brief Filed by Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Counsel for respondent in their reply brief in substance assign two reasons why the writ prayed for should not be granted:

1st. That it was admitted in the petition that the case at bar was the only case of the kind which had arisen.

2nd. That the conflict of opinion between the Circuit Courts of Appeal for the Fourth and Eighth Circuits was upon an incidental question, if there was any conflict at all.

On Page 1 of their brief, referring to the petitions filed in Numbers 583 and 584, it is said:

> "Both admit these are the only cases of the kind which have arisen under the Bankruptcy Act.
> * * * * * * * "

In this statement they are in error, as even a casual reading of the petitions will show. Two propositions were submitted in

support of the prayer for the writ. The first was that the questions of law involved were novel, of peculiar gravity, and of vital importance in the general administration of the Bankruptcy Act of 1898. The second was, conflict of decision.

As to the first proposition, on Page 4 of petition, it was said:

> "The questions, as presented, have not heretofore been directly passed upon. * * * "

It is presumed that this language was the supposed admission upon which counsel relied. The question, as presented—to wit: whether or not an attachment which was a valid lien upon property which *could not* pass to the trustee of a bankrupt, *is void quoad such trustee*, under Section 67-f, and that he should be subrogated to the rights of an attaching creditor—so far as we know, has not been directly passed upon. The principle, however, involved, is whether or not the liens which are made void by Section 67-f are confined to those upon property which passes to the trustee. This question has been passed upon in controversies between the lienor and the bankrupt, but not between the lienor and the trustee of the bankrupt.

The Court is respectfully asked to bear in mind, that the property attached in the case at bar *can not* pass to Baird's trustee, if the lien be declared void and cancelled.

The Court of Appeals in the case at bar, when construing Section 67-f, said:

> "It is contended, however, that as the first clause of this section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of clause 67-f can have reference only to liens on property which, if the liens were annulled, would pass to the trustee of the bankrupt released from the lien.
>
> "We think this is narrowing the more obvious meaning of the words. The wording seems clearly to contemplate that a creditor might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property, which would not,

if unaffected, pass to the trustee in bankruptcy.

* * * * * * * * "

The construction thus given and the proposition established, is novel and of general importance in the administration of the Bankruptcy Act, and especially in those States having registry laws.

The fact that the company, the property of which was attached, was subsequently adjudged a bankrupt, is a mere incident, and consequently neither did nor could influence the Court in arriving at the construction placed upon the section in question. The construction given, and the principle established, must, so long as that opinion remains unreversed, be the established rule of construction throughout the Fourth Circuit. The inevitable consequence is, that in every instance, in which a creditor secures a lien by judgment or attachment upon property, within four months of the filing of a petition in bankruptcy, by or against the debtor, because of the failure of the purchaser to record the evidence of his purchase, though the debtor may have received, as in the case at bar, every dollar of the purchase money, the lien is made void by the statute, and the property either remains in the hands of the purchaser, discharged from the lien, or, at the opinion of the Court, the lien is preserved for the bankrupt's estate. If preserved, the trustee must then go into the Court in which the lien was secured and enforce it, since it is upon property over which the Bankrupt Court has no jurisdiction.

If a deed, as in the case at bar, had been recorded subsequent to the attachment, but prior to the filing of the petition, this legal absurdity is presented: A trustee who represents the bankrupt and the bankrupt's general creditors enforcing a lien against the covenants of the bankrupt in an instrument under seal, and upon property in which the bankrupt had no interest and which could not have been subjected by his general creditors prior to the filing of the petition.

The principle established in this case—to wit, that the liens made void by Section 67-f are not confined to those upon property

which passes to the trustee—is in direct conflict with the decisions of the Supreme Courts of North Dakota, Massachusetts, and Georgia. (See opening Brief, Pages 17 and 18.)

In the Georgia case, when construing Section 67-f, the Court used this language:

> "Aside from the authority cited, however, we think that the language of the statute offers ample warrant for the ruling here made.
>
> "The section in question provides simply that the effect of the discharge of such liens as are obtained within four months prior to the filing of a petition in bankruptcy shall be to pass the property against which the lien is held, 'to the trustee, as a part of the estate of the bankrupt.' So it seems that the effect of this language is clearly to exclude liens upon property which the bankrupt court does not undertake to administer, and over which it has no jurisdiction."

The second reason assigned by counsel was, that the conflict of opinion between the Circuit Courts of Appeal of the Fourth and Eighth Circuits, upon the question of what constitutes a preference, was upon an incidental question, and, further, that there was no conflict, and adds:

> "It will be observed, therefore, that neither in the decision of the District Court nor of the Circuit Court of Appeals, was it asserted that the liens were void because preferential, the result being reached because of the express language of Section 67-f of the Act."

How counsel can in good faith make this contention, we are not able to understand, except upon the hypothesis that the brief was prepared by counsel not before engaged in the case, and consequently not familiar with the record or opinion.

Judge Morris, in his opinion, after giving a statement of the facts, used this language:

> "Upon the issues made by the petitions and answers the court below ruled that the attachments against Baird, having been obtained through legal proceedings against him, when he was insolvent and within four months prior to the filing of the pe-

tition in bankruptcy against him, were null and void under Section 67-f of the Bankruptcy Act of 1898, *so far as they would give a preference to the attaching creditors,* * * * * "

The question of what constitutes a preference, was one of the main points of the cases, and to it the argument was chiefly directed, and this question was directly passed upon by the Court in its opinion (see quotation and comments in our opening Brief, Pages 20 and 21.)

If the Court in its opinion had held as our brothers contend, that the liens in question were not void because preferential, but solely because of the express language of 67-f of the Act, then its opinion would have been in direct conflict with that of the Supreme Court of Rhode Island. That court, in the case of Doyle v. Heath (22 R. I., 213, 47 Atl. 213), was asked to annul a certain judgment under the section in question, but when the objection was made that the judgment could not be affected by the Act, because the lien thereof antedated the four months' limit, the Court stated that it would construe the language of clause "F" in the light of the purpose to be accomplished by the act, and would extend its operation no further than was necessary to accomplish its purpose, preventing a *preference.*

~~tween creditors having an interest in the property.~~

Without discussing what would be the effect of giving a literal interpretation to the language of clause "F," Judge Blodgett said:

> "We decline to adopt such a construction of the language of the Act, and we construe the words 'all judgments,' to be qualified and defined by their context, and to be limited to the lien or preference created by such a judgment. Such a construction seems to us to be in exact accord with the spirit and scope of the Act in general, as well as of Section 67—that no *preference* should be created within a specified time of filing the petition in bankruptcy."

Counsel in their brief (p. 3) say: "The Circuit Court of Appeals further held that it was only because the property attached by the creditor remained *quoad the attaching creditor* the

property of the bankrupt that the attachments were liens at all." We do not understand the purpose of this statement, unless it was intended to emphasize the idea of a literal gratification of the words of the section in question. That the property when attached was the property of Baird *quoad the attaching creditor* is not questioned: but it will not be contended that it was in any sense Baird's property forty-nine days next prior to the date the petition was filed. Since, on November 7th, 1900, a valid deed was recorded. That it was Baird's property *quoad* the attaching creditor subsequent to December 7th, 1899, the date of the sale by him, is a legal fiction created by the Registry Statutes of Virginia.

Before preparing the petition in this cause we were fully apprised by the previous decisions of this Honorable Court, that it exercised sparingly and with great care its power to issue the writ of certiorari. But that such power would be exercised when the circumstances of the case were such as to make it necessary, that some question of general importance might be finally determined, or to secure uniformity of decision between two or more Circuit Courts of Appeal, or between a Circuit Court of Appeals and a court of last resort of a State.

Upon the subject of Bankruptcies there is a constitutional requirement of uniformity—the laws passed on the subject must be uniform throughout the United States. It is submitted that this Court, the Court of the Nation, should see that there is uniformity of construction; otherwise, the uniformity of enactment becomes a nullity.

The nature and object of the Act is such that any difference of opinion between Courts of Last Resort, when construing its primary provisions, presents a question of such general importance that this Court should exercise its power, hear and determine the question.

It is earnestly submitted, that with the Courts of Last Resort of Massachusetts, North Dakota, and Georgia, holding that the liens made void by Section 67-f were confined to those upon property of the bankrupt *which passed to his trustee;* with

the Circuit Court of Appeals of the Fourth Circuit holding the converse; with the Circuit Court of Appeals of the Eighth Circuit holding the test of a preference to be—whether or not a transfer or payment will have the effect to pay on one claim a larger dividend, *out of the estate of the bankrupt*, than that estate will pay on other claims of the same class, that is, *making the effect of the payment upon the equal distribution of the estate of the bankrupt* the test, and not the effect such payment might have upon the creditor; and with the Circuit Court of Appeals of the Fourth Circuit holding the test of a preference to be—whether or not equal percentage of payment is made to each creditor, regardless of the fact that such payment *would not be made out of the estate of the bankrupt*, does present such a serious conflict that this Court should grant the writ of certiorari as prayed for.

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